In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-355

HARRIET C. RUSSELL, EXECUTRIX OF THE ESTATE OF T. C. RUSSELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Kansas (Pet. App. B2-B7) is reported at 327 F. Supp. 632. The opinion of the court of appeals (Pet. App. A2-A8) is reported at 461 F. 2d 605.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1972 (Pet. App. A2-A8). The petition for a writ of certiorari was filed on August 30, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the United States may sue a surviving joint tenant for unpaid estate taxes pursuant to Section 6324(a)(2) of the Internal Revenue Code of 1954, without making assessment against her individually as a transferee.

STATUTES INVOLVED

The pertinent provisions of Section 6324 and 6901 of the Internal Revenue Code of 1954, 26 U.S.C. 6324 and 6901, are set forth at Pet. 3–4.

STATEMENT

The United States initiated this action to reduce to judgment petitioner's liability, under Section 6324(a)(2) of the Internal Revenue Code of 1954 ("the Code"), for unpaid estate taxes in the amount of $116,165 due from her husband's estate. The material facts are not in dispute. Petitioner is the surviving joint tenant of property included in her husband's gross estate for federal estate tax purposes. Since this property did not pass through the probate estate, it was not available to the personal representative for payment of estate taxes. The estate tax was not paid when due, and petitioner as surviving joint tenant therefore became personally liable for the tax under Section 6324(a)(2). Assessment for the taxes due was made against the estate but not against petitioner.

The district court granted petitioner's motion for summary judgment on the ground that the action was

barred by the government's failure to make a timely assessment against petitioner pursuant to Section 6901 of the Code (Pet. App. B2–B7). The court of appeals reversed and remanded the cause on the ground that under *Leighton* v. *United States*, 289 U.S. 506, the absence of an assessment against petitioner in her personal capacity does not bar an action to recover estate taxes from her as a surviving joint tenant (Pet. App. A3, A5–A8).

ARGUMENT

Section 6324(a)(2) provides that if an estate tax is not paid when due, a "surviving tenant * * * who receives * * * property included in the gross estate * * *, to the extent of the value, at the time of the decedent's death, of such property, shall be personally liable for such tax." Petitioner does not dispute that this provision makes her personally liable for the estate taxes not paid by her husband's estate. Petitioner's sole argument here is that the government's failure to make an assessment under Section 6901 against her in her personal capacity bars the present action for recovery of those taxes. This contention was properly rejected by the court below and warrants no further review.

Section 6324(a)(2), like its predecessors, imposes upon certain individuals a primary personal liability for payment of all or part of the unpaid estate taxes due from another's estate. See *Schuster* v. *Commissioner*, 312 F. 2d 311 (C.A. 9). Surviving joint tenants such as petitioner have been included within

the coverage of the statute since 1942.[1] Section 6901 provides a summary and expeditious method for the collection of taxes from transferees and fiduciaries which was not previously available to the government.[2] Since 1942, therefore, the procedures set forth in Section 6901 have been available to the government for enforcement of a surviving joint tenant's liability for unpaid estate taxes under Section 6324(a)(2).

Petitioner apparently agrees (Pet. 8) that this Court's decision in *Leighton* v. *United States*, 289 U.S. 506, if permitted to stand, is dispositive of her argument that the procedures set forth in Section 6901 are a mandatory prerequisite to a suit by the government to recover taxes under Section 6324(a)(2). In *Leighton*, the government had brought suit to compel transferees of certain corporate assets to pay unpaid income taxes due from the insolvent corporation. There, as here, assessment had been made against the taxpayer (the corporation) but not against the transferees individually. The transferees there, as here, argued that by enacting the procedures

[1] Originally enacted as Section 209 of the Revenue Act of 1916, 39 Stat. 756, the provision has remained essentially unchanged in substance, but was amended in 1942 to expand the enumeration of persons covered and to bring within its scope substantially all property interests includible in the gross estate. Section 411 of the Revenue Act of 1942, 56 Stat. 798.

[2] This provision was first enacted as Section 280 of the Revenue Act of 1926, 44 Stat. 9. Prior to its enactment the government could enforce so-called "transferee liability" only by seeking legal or equitable relief. See *Commissioner* v. *Stern*, 357 U.S. 39; *Phillips* v. *Commissioner*, 283 U.S. 589, 592; *Leighton* v. *United States*, 289 U.S. 506, 507–508.

now embodied in Section 6901, Congress had required "an assessment against them before suit" and that such procedures were intended to be "the sole remedy available" to enforce transferee liability. 289 U.S. at 509. This Court, after reviewing several post-1926 lower court decisions recognizing the government's right to collect taxes from transferees by suit without assessment, rejected the contention that compliance with the procedures now found in Section 6901 was a mandatory prerequisite to bringing such suit.

Petitioner errs in contending (Pet. 9–13) that this Court had not been properly apprised of the relevant legislative history when *Leighton* was decided. Although not discussed in the Court's opinion, the congressional reports accompanying both the 1926 and 1928 Revenue Acts, including those upon which petitioner relies, were thoroughly discussed in the government's brief in *Leighton*. See Gov. Br. 17–19, *Leighton* v. *United States*, No. 735, O.T., 1932. The government argued there that the predecessor of Section 6901 contained no language indicating that its assessment procedures must be followed before a suit for collection may be initiated, that the statutes were not ambiguous, and that reliance on legislative history is appropriate only when necessary to settle, rather than create, doubt. Those arguments apply equally here. See, *e.g.*, *Ex Parte Collett*, 337 U.S. 55, 61; *United States* v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77, 83–84. And there is, in any event, no reason now to overturn this long-standing interpretation of the statute.

As the court of appeals correctly determined, the fact that the present case involves a legal action in debt whereas *Leighton* was a suit in equity is irrelevant. It is well established that under *Leighton*, which was concerned with the preservation generally of pre-existing modes of revenue collection, the government may maintain legal actions to enforce obligations to pay taxes without resort to or compliance with the Section 6901 procedures. See, *e.g.*, *United States* v. *Motsinger*, 123 F. 2d 585 (C.A. 4). Assessment of tax liability is not itself a prerequisite to the government's right to collect taxes owed to it. Rather, statutory assessment procedures are designed merely to facilitate collection, and the government may sue to collect taxes without assessment unless the statute expressly provides otherwise. See, *e.g.*, *Savings Bank* v. *United States*, 19 Wall. 227, 240–241.

This Court's decision in *Leighton* was thus properly applied by the court below, and there is no conflict among the courts of appeals.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

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